



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the-Matter of the Appeal of)
KENNETH A. AND AMY MUMM)

Appearances.:

For Appellants: Russell E. Parsons
Attorney at Law

For Respondent: A. Ben Jacobson
Counsel

James Philbin
Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on protests to proposed assessments of additional personal income tax against Kenneth A. Mumm, individually, in the amounts of \$8,282.04 and \$9,766.63 for the years 1959 and 1960, respectively; against Amy Mumm, individually, in the amounts of \$8,306.04 and \$9,813.83 for the years 1959 and 1960, respectively; and against Kenneth A. and Amy Mumm, jointly, in the amounts of \$25,890.39 and \$29,126.58 for the years 1961 and 1962, respectively. Penalties in the amounts of \$12,945.20 and \$14,563.30 for the years 1961 and 1962, respectively, were also imposed against Kenneth A. and Amy Mumm for failure to file returns and failure to file after notice and demand, pursuant to sections 18681 and 18682 of the Revenue and Taxation Code.

Appellant Kenneth A. Mumm derives income from a game called "Clock-A-Line." The game is operated under a license from the City of Long Beach and a federal stamp tax is paid.

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A maximum number of 40 people can play the game at one time. Each player is charged 20 cents per game. In front of each player is an inclined play board similar to a pinball machine and an elevated scoring panel. When a game starts, a $7/8$ th inch steel ball is automatically and simultaneously released for play by each participant on his play board. The player activates his ball by using a spring-loaded, rubber-tipped plunger, pulling it towards him against a compression spring and releasing it so as to strike the ball and propel it up a guide lane on the right-hand side of the play board. After going out a release gate at the end of the guide lane, the ball may continue to follow along a semicircular arch until it strikes a bumper post at the left-hand end of the arch, rebounding back against the release gate, and then downward into the scoring area, or may rebound directly from the bumper down into the scoring area, or after leaving the guide lane may drop directly into the scoring area.

In the scoring area are 25 holes approximately $15/16$ th of an inch in diameter, arranged in two rows and five different colored groups, and numbered one to five in each group. One of the holes, the white 3, is plugged with a bumper. In front of the upper row of holes are 12 bumper posts, each approximately 0.96 of an inch in diameter. There are also upright pins near the holes. Bumper posts are so arranged that except for three holes, a ball cannot be shot directly into any hole without previously striking at least one bumper. Shots not hitting a bumper are extremely rare. The ball also often strikes one or more of the pins. As the ball drops into a particular hole this is reflected by a light on the scoring panel. The 24 unplugged holes are the only apertures through which the ball may descend. After descent the ball returns to the starting point for further activation. The five horizontal columns on each panel reflect one of the five colors, read "1, 2, 3, 4, 5" from left to right, and, consequently, there are also vertical lines of five 1's, 2's, 3's, 4's and 5's. The white 3 is lit on each scoring panel when play starts.

When each game begins a clock is started and "any and all players lighting a complete line on their scoring panel, horizontally, vertically, or diagonally are winners. The winner or winners receive chips which are convertible into cash. In the usual game the amount of the prize is determined by the number of players, \$2 where there are 5 to 18 players, ranging up to \$4 with 40 players. An additional \$1 bonus is awarded when a line is completed within a minute or other announced

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time. There is an additional \$1 prize when a winner, whether or not within the 'announced time, lights no numbers on his panel other than those in his winning line. This is called making a perfect score.

Approximately 40 games are played per hour and 300 to 400 are played in a day. About a third of the participants are experienced players. There are four announced \$25 "jackpot" games each hour and three announced \$100 "jackpot" games each day for the winner with a perfect score. There are also four "guaranty" games each hour, announced as either \$5 or \$10 games, where the winner, whether or not he "beats" the clock or makes a perfect score, receives the guaranteed amount instead of the usual prize.

Cards are kept showing jackpot winners. Introduced into evidence were 12 such cards of three jackpot winners. These indicated that one player won three \$25 jackpot games in one month. Two tally sheets recording game results per hour were submitted showing jackpot winners and guaranty game winners by machine number. Neither sheet indicates that the same player won more than one premium game, either guaranty or jackpot, in an hour.

A criminal action against operators of a "Lite-A-Line" game was tried in the Long Beach Municipal Court in 1943. These operators of the game similar to Clock-A-Line were acquitted by a jury of violating sections 319 and 320 of the Penal Code. In determining whether the games were of skill or chance the jurors played against experts selected by the defendants and the experts won 80 to 90 percent of the time. Following this decision the City of Long Beach amended its ordinance and licensed games such as Lite-A-Line and Clock-A-Line.

Respondent concluded that the operation of Clock-A-Line constituted an illegal activity for which no deductions from gross income should be allowed. The disallowance of all claimed business deductions resulted in the proposed additional assessments. There is no controversy concerning the penalties.

During the years in question, section 17297 of the Revenue and Taxation Code provided in part:

In computing taxable income, no deductions shall be allowed to any taxpayer on any of

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his gross income derived from illegal activities as defined in Chapters 9, 10, or 10.5 of Title 9 of Part 1 of the Penal Code of California,....

Appellants principally contend that Clock-A-Line is a game of skill and, therefore, not within any of the code definitions of an illegal activity set forth in the specified chapters.

Respondent contends Clock-A-Line is a game of chance and, furthermore, that in **all** aspects it constitutes a lottery.

The crucial question is whether the activity constitutes a lottery as defined and declared a misdemeanor in sections 319 and 320 of the Penal Code. There are three elements of a lottery: (1) a prize, (2) consideration and (3) distribution by chance. (California Gasoline Retailers v. Regal Petroleum Corp., 50 Cal. 2d 844 [330 P.2d 778].) Players of Clock-A-Line clearly paid a consideration, and cash prizes announced in advance were sought by and awarded the winners. Therefore only the element of chance is in issue. The test to be applied is stated in People v. Settles, 29 Cal. App. 2d Supp. 781 [78 P.2d 274] as follows:

A game is not to be regarded as one of skill "merely because that element enters into the result in some degree, or as one of chance solely because chance is a factor in producing the result. The test of the character of a game or scheme as one of chance or skill is, which of these factors is dominant in determining the result?

Respondent presented Mr. E. Paul DeGarmo, a professor of industrial and mechanical engineering at the University of California, as an expert witness. He has played and observed the operation of Clock-A-Line and has tested ball-rolling games and testified as an expert on numerous occasions. In 1959 he conducted extensive tests of a game called Lite-A-Line and his report on the tests was introduced into evidence. He testified that in his opinion Lite-A-Line differed only slightly from Clock-A-Line, that insofar as whether skill or chance predominated the games were substantially the same and that there would be no significantly different results

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if tests were made of Clock-A-Line. In general, the testimony of other witnesses further confirmed that there were no significant differences between the two games.

Professor DeGarmo testified that in his opinion chance and skill were present in both activities, but chance predominated over skill in determining the winners of both games. In his first Lite-A-Line test, six inexperienced players competed for 25 games. According to Professor DeGarmo, the test established that attainable skill is acquired by a large proportion of players after relatively little experience, and since many players have this basic skill, the outcome is determined predominantly by chance. The test also revealed that no player won with regularity. One player participated in 24 games with her play board covered so she could see nothing but the ball as it became available for replay. She won or tied as many of the 24 games as all but one player. Professor DeGarmo contrasted this with the batting performance which could be expected from a blindfolded baseball player. He also reviewed the results of a similar test made by two other professors who recorded the results of 120 games played by 13 inexperienced players. In contradiction to the alleged predominance of skill, it was established that none of the participants established any consistent pattern of improvement.

In the next four tests conducted by Professor DeGarmo one machine was equipped with an automatic release mechanism so that the plunger could be released from an identical position as many times as desired, presenting, in his judgment, a degree of control beyond human capability. The tests involved four different release points. The maximum number of shots that entered the same hole from any setting was 13 out of 100, a number which the professor reported has occurred frequently in testing various pinball machines with 26 holes. Professor DeGarmo reported that in his opinion these four tests again indicated that chance predominated, since even a "super-human" player could not determine in more than 13 percent of his shots into which hole the ball would go. Professor DeGarmo explained that the control the player has over the ball is limited because his control of velocity, a critical factor in the game, is curtailed by the narrow range of the release point which measures about an eighth of an inch. He also reported that the placement of the holes and bumpers further limited the exercise of skill.

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Testimony at the hearing relative to Clock-A-Line established that there were relatively few perfect scores, either in ordinary or jackpot. games. The hourly sheets, submitted as exhibits indicated a wide distribution of winners, evidencing that even the experienced players do not win with any degree of consistency. Some of the testifying players maintained they were more successful at Clock-A-Line than Lite-A-Line. Only one of the six witnesses affirmatively asserted, however, that he could shoot the ball into a preselected hole on the Clock-A-Line play board with any more regularity than was demonstrated by the mechanical test of Lite-A-Line. The one witness who was an exception estimated that he could make 20 out of 100 shots into the easier holes. While there was testimony to the general effect that several experienced players make a living off the game, such testimony also was unsubstantiated. To the contrary, two of the witnesses declared they were "only a little ahead" and another two testified they were "about even." A fifth witness indicated that if a person was "even" over a long period of time he would be "the biggest winner that ever walked in there." While some of the witnesses maintained that skill could be exercised by putting spin on the ball through plunger manipulation, the professor testified that due to the limited manner in which the plunger strikes the ball it would be impossible to put such "English" on the ball.

We believe that the evidence clearly establishes that the winners in competition against each other and against the "house" were determined predominantly by chance and that the game in all other aspects also constituted an illegal lottery:

For purposes of this administrative determination, the 1943 decision in the Long Beach Municipal Court does not establish that the games were predominantly ones of skill. The burden of proof required in the criminal proceeding, i.e., proof beyond a reasonable doubt, does not apply to an administrative hearing, the rules of evidence are more stringent in court, and the two proceedings have different objectives. (Helvering v. Mitchell, 303 U.S. 391 [82 L. Ed. 917]; Stuck v. Board of Medical Examiners, 94 Cal. App. 2d 751 [211 P.2d 389]; Bold v. Board of Medical Examiners, 135 Cal. App. 29 [26 P.2d 707].) Furthermore, the determination of this matter is independent and unaffected by the fact that the City of Long Beach licensed this activity. Nor is there any basis for estoppel against respondent. Estoppels will not be invoked against the government or its agencies

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except in rare and unusual circumstances, and such circumstances were not present here. (Aebli v. Board of Education, 62 Cal. App. 2d 706, 729 [145 P.2d 601]; California State Board of Equalization v. Coast Radio Products, 228 F.2d 520; Market Street Railway Co. v. California State Board of Equalization, 137 Cal. App. 2d 87 [290 P.2d 203; California Cigarette Concessions, Inc. v. City of Los Angeles, 53 Cal. 2d 865 [3 Cal. Rptr. 675, 350 P.2d 715].)

Many of the constitutional objections raised by appellants with respect to section 17297 were disposed of in Hetzel v. Franchise Tax Board, 161 Cal. App. 2d 224 [326 P.2d 611], and in Hall v. Franchise Tax Board, 244 Cal. App. 2d 843 [53 Cal. Rptr. 597]. In any event, we adhere to our well established policy not to pass upon the constitutionality of a statute in an appeal involving unpaid assessments, since a finding of unconstitutionality could not be reviewed by the courts. (Appeal of C. B. Hall, Sr., Cal. St. Bd. of Equal., Dec. 29, 1958; Appeal of Loran and Daisy Freeman Cal. St. Bd. of Equal., Dec. 19, 1962.) Appellant; also relied on the purchase of federal special tax stamps as evidence of the legality of the business. Such reliance is misplaced in view of an express disclaimer on the face of the document that "The Internal Revenue Laws provide that the payment of any tax imposed by such laws for carrying on any trade or business shall not be held ... in any manner to authorize the commencement or continuance of such trade or business contrary to, the laws of such State."

O _ R _ _ D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

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IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on protests to proposed assessments of additional personal income tax against Kenneth A. Mumm in the amounts of \$8,282.04 and \$9,766.63 for the years 1959 and 1960, respectively; to proposed assessments of additional personal income tax against Amy Mumm in the amounts of \$8,306.04 and \$9,813.83 for the years 1959 and 1960, respectively; and to proposed assessments of additional personal income tax and penalties against Kenneth A. and Amy Mumm in the total amounts of \$38,835.59 and \$43,689.88 for the years 1961 and 1962, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 3rd day of November, 1969, by the State Board of Equalization.

John W. Lynch, Chairman

Robert K. Gier, Member

Scott D. Gier, Member

_____, Member..

_____, Member

ATTEST :

J. H. H. H.